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No. 10-965

IN THE

Supreme Court of the United States

CITY OF LOVELAND, OHIO,

Petitioner,

v.

BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether enforcement and/or modification of a Clean Water Act consent decree should be determined by the federal court having original and continuing jurisdiction over that decree and the sewer system that is the subject of the decree.

Whether a substantial federal question is raised where there is a dispute as to whether or how a federal Clean Water Act consent decree to which the United States is a party and the primary plaintiff, can be modified.

Whether a federal court correctly exercises jurisdiction over a federal consent decree matter when: (a) the state trial court dismisses the state court action on substantive grounds and, in so doing, determines that the federal court has prior and primary jurisdiction over the underlying dispute and; (b) the federal court is presented with an original action asking it to enforce a federal consent decree.

Whether this Court should grant review to decide a fact intense issue not yet addressed by another court: whether a non-party to a federal Clean Water Act consent decree, who, despite notice, chose not to object to the consent decree or to even participate in the underlying consent decree case, while accepting the benefits of the consent decree and consolidated sewer district for many years, may be enjoined from attempting to modify the consent decree while its obligations are pending.

Whether a state court litigant, seeking to modify a federal Clean Water Act consent decree, may evade determination of the action by the federal court with original and continuing jurisdiction over the decree by failing to name the United States as a defendant in the state court action.

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INTRODUCTION

More than a quarter century ago, Petitioner City of Loveland ("Loveland") consolidated its municipal sewer system into a larger, county sewer district created by the Respondent Board of Commissioners of Hamilton County, Ohio ("Board"). Ratepayers across the county system then paid for a massive upgrade to the small Loveland plant and added sewers to many adjoining jurisdictions, fostering much population growth in that part of the County. Nearly seven years ago, after two rounds of court hearings, more than two years of litigation, and public notice, the county sewer district (including all of its sewer plants and systems, such as those located in and around Loveland), became subject to a federal Clean Water Act consent decree. Two years ago, through an action filed in state court, Loveland effectively sought to "unconsolidate" itself from the county sewer district, and in the process, modify the consent decree to take control of property, sewer lines, appurtenances, and ratepayers[1] far outside of its municipal jurisdiction. While Loveland says its state court action—which was dismissed by the state trial court that heard it—is grounded solely in state law,[2] the federal trial and appellate courts below pierced through that

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1. Loveland admitted, by public statement, that it was seeking to exercise control over 40,000 ratepayers, a number that is nearly 3.5 times larger than Loveland's population.

2. Even the Clermont County, Ohio Court of Common Pleas understood the speciousness of this claim as it dismissed Loveland's state court complaint for failure to state a claim. It granted the Board's motion to dismiss, in a 20-page Decision/Entry, after the filing of an amended complaint, full briefing, and oral argument. (Pet. App. 6a.)

facade; both found that Loveland's state court "collateral attack" was an attempt to modify the consent decree.

The only court that should determine whether a litigant can modify a federal Clean Water Act consent decree is the federal court with continuing jurisdiction over that decree. Four separate federal judges, with a combined 123 years on the bench, performed independent reviews of this matter and reached the same conclusion. Further, not a single member of the court of appeals voted to grant Loveland's request for *en banc* review of the decision below.

The Sixth Circuit applied this Court's precedent to the facts. It found federal jurisdiction: (1) because the case is based on the Board's federal declaratory judgment complaint which asked the district court to enforce its consent decree; and (2) because jurisdiction properly lies under the substantial federal question doctrine. The decision below does not conflict with a decision of this Court or other circuit court on the same matter. It certainly does not present an important issue of unsettled federal law.

There is no federal jurisdiction issue because no federal court interpreted a state law contract or addressed the merits of Loveland's alleged state law claim. In fact, a state trial court dismissed Loveland's state complaint for failure to state a claim and declared that the federal court was in a better position to determine whether Loveland could modify the federal Clean Water Act consent decree by taking control over real and personal property subject to the decree. The state court action is currently on appeal,

and is stayed at Loveland's request. A decision affirming the state trial court would seem to moot this petition.

With its Petition, Loveland invites new consent decree law: the wholesale opening and revision of ongoing federal consent decrees by modification through state court litigation. Federal consent decrees cover a wide range of federal statutory matters and federal courts typically retain jurisdiction over the implementation and modification of these decrees. Yet, Loveland is essentially asking this Court to allow state courts across the country to modify federal consent decrees—without the United States being a participant to the actions.

Ironically, Loveland accuses the federal courts of "hijacking" a state court case and allowing an "end run" around removal jurisdiction, when that is exactly what Loveland sought to do with its action.[3] There is no applicable "circuit-split" or manifest injustice created by Loveland's defeats in multiple forums. The jurisdictional rules are clear; Petitioner's arguments run afoul of clearly articulated and well settled legal principles. The Petition should be denied.

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3. (Pet. 14, 16.) Loveland is located in multiple Ohio counties. It filed its state court action to modify the federal consent decree in the county where the smallest fraction of its citizens reside, rather than in federal court or the county where the overwhelming majority of its population is located. The real "end run" here was Loveland's attempt to avoid the federal court's continuing jurisdiction over its Clean Water Act consent decree by seeking to modify that decree in state court.

STATEMENT OF THE CASE

The Loveland City System Became a Regional System.

In 1968 the Board reorganized its county-wide Sewer District No. 1 which encompassed the far reaches of Hamilton County under the new name of Metropolitan Sewer District of Greater Cincinnati (MSD). The MSD includes numerous participating political subdivisions surrounding the Cincinnati area, and encompasses hundreds of miles of sewers and numerous major treatment works throughout Hamilton County.

Loveland placed its Polk Run wastewater treatment plant and sewers (collectively the "Old City System") into service in roughly 1970. (Pet. App. 3a.) In 1985, Loveland passed ordinances to join Hamilton County's Sewer District and to turn the use, maintenance, and operation of its Old City System over to MSD. Loveland and the Board entered into an agreement (the "1985 Agreement") pursuant to which the Board agreed to maintain, repair and operate the existing Old City System as part of the MSD. (*Id.*) Over the next 25 years, the Board and its ratepayers transformed the Old City System into a modern and significantly larger regional sewerage area and system that became a part of the MSD (the "MSD Polk Run Segment"). (Pet. App. 25a.) As a result, thousands of customers in MSD territory *outside* of Loveland's corporate limits were added to the MSD customer base and MSD's Polk Run Segment. (Pet. App. at 23a.) The 1985 Agreement contains no termination provision.

The Consent Decree and Loveland's Lack of Objections Thereto.

The United States and others filed suit against the Board and the City of Cincinnati for alleged Clean Water Act, 33 U.S.C. §§ 1251-1387, violations in 2002 (the "Consent Decree Case"). (Pet. App. 3a-4a.) Before entry of the decree, the District Court set a fairness hearing and directed the United States to publish notice in *The Federal Register*, 68 Fed. Reg. 68651-02 (Dec. 9, 2003), to permit a 30-day period for public comment. (Pet. App. 4a.) Loveland did not submit a comment or participate at the fairness hearing. (*Id.*) Notably, objections were filed by The Sierra Club and several individuals, with resulting decree negotiations. (Dist. Ct. ECF Doc. Nos. 114-115.) The action was resolved by two consent decrees (collectively, "Consent Decree") in 2004. (Pet. App. 22a-22b.)

The Consent Decree materially impacted miles of sewers and sewer appurtenances throughout the MSD Hamilton County territory, including the Loveland area, and contemplates years of complex remedial actions involving all sewer systems under MSD control (including Loveland sewers) to be shouldered by all MSD's ratepayers primarily through uniform sewer rates throughout the MSD.

The Consent Decree Encompasses the Polk Run Plant and MSD Polk Run Segment.

The Polk Run Plant and MSD Polk Run Segment are part of the Consent Decree's definition of "Sewer System," which is the very subject of the Consent Decree. (Dist. Ct. ECF Doc. Nos. 1 and 363, at ¶ 4.) The Consent Decree

governs any change to the Board's Sewer Systems. (Dist. Ct. ECF Doc. No. 131, §§ I, III.)

Consent Decree Modification and the District Court's Continuing Jurisdiction.

The District Court retained jurisdiction over the terms and enforcement of the Consent Decree. Specifically, the Consent Decree provides that:

> The [U.S. District Court for the Southern District of Ohio] shall retain jurisdiction to enforce the terms and conditions and achieve the objectives of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, modification, implementation or execution of this Decree. (Pet. App. 5a.)

The Consent Decree can be modified only if all parties to the decree agree, or on the successful 60(b) motion of the Board or Cincinnati. (Pet. App. 26a, 30a-31a.) There is no provision for decree modification by a non-party. (Pet. App. 30a.) Loveland chose not to participate or become a party to the Consent Decree.

Any change in interest or operating role of the MSD Polk Run Segment and/or Plant requires modification of the Consent Decree.

> If [the Board or Cincinnati] seeks to name a successor in interest to assume any or all of its interest in, or operating role with response

> to, the Sewer System or WWTPs, [the Board or Cincinnati] may request modification of this Consent Decree from U.S. EPA/Ohio EPA to amend this Consent Decree . . . . If the Parties agree on a proposed modification . . . , they shall prepare a joint motion to the Court requesting such modification and seeking leave to join the proposed successor in interest. If the Parties do not agree . . . [the Board] may file a motion seeking modification . . . however, nothing in this Paragraph is intended to waive the Plaintiffs' [U.S., Ohio, and ORSANCO's] right to oppose such motion . . . .
>
> (Dist. Ct. ECF Doc. No. 131, § III(C).)

Loveland's State Court Action—a Collateral Attack to Modify the Consent Decree.

Loveland filed a complaint in the Common Pleas Court, Clermont County, Ohio (the "state court" action) seeking a judgment that the Board "return operation of the [sewer system] to . . . Loveland." (Pet. App. 5a.) (By now, the sewer system over which Loveland sought control had been vastly expanded and improved at the considerable expense of MSD ratepayers). Although *one third* of the fact allegations in Loveland's state court complaint were dedicated to the Consent Decree pending in federal court, Loveland sought to evade the federal consent decree issues by filing suit only against the Board in a state court, and did not include the Consent Decree parties—the United States, Ohio, ORSANCO, or Cincinnati—as defendants. (Dist. Ct. ECF Doc. No. 1, Ex. D.)

Loveland did, however, admit that the MSD Polk Run Segment, including the Polk Run Plant, is subject to the federal Consent Decree. (*Id.*) And, it sought a declaration from the state court sanctioning termination of the 1985 Agreement and compelling the Board's assignment and conveyance of easements to Loveland "to the extent necessary . . . to operate and maintain" the Old City System sewers, the post-1985 sewers built by MSD in Loveland, and all sewers and customers *outside* Loveland which are part of the MSD Polk Run Sub-basin. (*Id.*) Those customers are served by sewers and treatment works listed in the Consent Decree.

The State Trial Court Dismissed Loveland's State Court Action.

The state trial court issued a 20-page Decision/Entry dismissing Loveland's state court complaint for failure to state a claim. (Pet. App. 6a.) It did so after full briefing on the Board's motion to dismiss Loveland's complaint, full briefing on the Board's motion to dismiss Loveland's amended complaint, and oral argument.

The state trial court notified the parties that it would have granted a stay in the case had it not dismissed the action, in part, because:

> The federal court has clearly accepted jurisdiction of [the Board's] declaratory judgment action since it directly affects the Consent Decrees . . . . [T]he Court believes that judicial economy and the risk of inconsistent results mandate that only one court determine that issue. The Court . . . believes that the

> federal court is in a better position to make that determination since any decision that this Court would make would directly affect the Consent Decrees, over which the federal court has retained jurisdiction. . . . Had this Court not dismissed the case, it would not have considered the remaining state claims, if any, until the resolution of the . . . federal action. (Pet. App. 6a-7a.)

The state court case is on appeal, and has been stayed at Loveland's request. (Pet. App. 8a.)

The Board's Federal Complaint.

When Loveland sought to modify the Consent Decree, the Board filed a complaint in federal court (the "Loveland Case"). The plaintiffs in the Consent Decree Case, including the United States, were named as defendants. (Pet. 3.) The Board asked the district court to enforce its Consent Decree. (Pet. App. 12a.)

Consolidation with the Consent Decree Case and the United States' Interest.

The Board moved to consolidate the Loveland Case and the Consent Decree Case, which all parties to the Consent Decree supported. (Pet. App. 24a.) In doing so, the United States stated that

- the "consent decrees were premised on the operating relationship between Loveland and the [Board] that has been in effect since 1985 and were specifically drafted to include the Polk Run system

in the definitions of Wastewater Treatment Plant and Sewer System"; and

- there "is little doubt that any decision altering ownership or control of the [MSD] Polk Run system or any portion thereof will have some impact on the decrees, to which the regulators [including the United States] *are* parties and have significant interests". (Dist. Ct. ECF Doc. 346, 1, 3.) (emphasis in original).

After consolidating the cases, the district court denied Cincinnati's motion to intervene in the Loveland Case as moot, noting that the issues raised by the Board were part of the consolidated matter and that the parties in the Consent Decree Case (including the United States) were able to assert and protect their interests regarding the Clean Water Act Consent Decree. (Dist. Ct. ECF No. 357, 3.) Because the United States could assert and protect its interest through the consolidated matter, the Board voluntarily dismissed its claims against the United States in the Loveland Case without prejudice. (Dist. Ct. ECF No. 364, 1-2.)

Denial of Motion to Dismiss / Grant of Judgment on the Pleadings.

The district court found that it had jurisdiction under 28 U.S.C. § 1331 and denied Loveland's motion to dismiss. (Pet. App. 6a.) The district court also granted the Board and Cincinnati's motion for judgment on the pleadings, finding that: Loveland failed to object to the Consent Decree despite having notice; that Loveland was seeking to modify the Consent Decree; that no Consent

Decree party sought modification; that Loveland sat silent for 5 years; that the Consent Decree parties relied on Loveland's silence as they crafted the complex, multi-year infrastructure improvements to implement the required remedies; and that inequity would result if Loveland were permitted to enforce its stale claim to terminate the 1985 Agreement, and thus modify the Consent Decree. (Pet. App. 8a.)

The district court enjoined Loveland from attempting to modify the Consent Decree through termination of the 1985 Agreement or otherwise—not forever—but only while the Consent Decree is pending. (*Id.*)

The Sixth Circuit Unanimously Affirmed the District Court Decision.

The court of appeals affirmed. In doing so, it concluded that federal jurisdiction existed: (1) because the Board asked the district court to enforce its Consent Decree; and (2) because subject matter jurisdiction arose under the substantial federal question doctrine. (Pet. App. 12a.) Loveland requested an *en banc* review of the Sixth Circuit's panel decision. No judge voted to allow that review. (6th Cir. Order, 10/27/2010.)

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY RECOGNIZED FEDERAL JURISDICTION IN ACCORD WITH OTHER CIRCUITS AND ADHERED TO THIS COURT'S LONGSTANDING REMOVAL JURISPRUDENCE.

The Sixth Circuit's decision presents no jurisdictional issues requiring review. First, because the decision addresses no state contract or state law claims, it neither creates nor magnifies any perceived split among the circuits regarding federal court jurisdiction. Second, the appellate court did not intrude into the state court's domain. It did not hold that a state court defendant could "create federal jurisdiction" by filing an original action in federal court that raises a federal defense to a state law claim. This is a red herring by Loveland. Loveland's actual state law case was *dismissed* and the *federal* appellate court addressed the Board's *federal* complaint. Third, the Sixth Circuit's decision does not conflict with the Seventh Circuit on whether an adverse impact to a consent decree, alone, provides federal question jurisdiction.

A. The Sixth Circuit Decision Affirming Federal Jurisdiction Complies with This Court's Precedent and Does Not Conflict with any Circuit.

The Sixth Circuit found that jurisdiction existed for two reasons: (1) because the Board requested "that the district court enforce its consent decree" over which the court retained jurisdiction; and (2) because the case "properly lies under the substantial federal question doctrine." (Pet. App. 12a.) Loveland ignores the first

basis for jurisdiction, which signals its strength and significance. Loveland then incorrectly asserts that the substantial federal question portion of the decision below conflicts with the decisions of other circuits. (Pet. 8.)

There is no conflict. The Sixth Circuit adhered to this Court's guidance in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). Although Loveland acknowledges that the appellate court applied the required *Grable* analysis, it essentially argues that the court erred in applying the facts. If there is any circuit familiar with *Grable*, it should be the Sixth. Indeed, this Court affirmed the Sixth Circuit when it adopted the *Grable* analysis. *See id.* at 312.

Loveland relied upon *City of Warren v. City of Detroit*, 495 F.3d 282, 286-88 (6th Cir. 2007), to oppose jurisdiction below. (Pet. App. 9a.) The Sixth Circuit distinguished *Warren* as involving a request to interpret a state contract and not involving modification of a consent decree. (Pet. App. 11a-12a.) The factual difference is notable. The Sixth Circuit found jurisdiction here based on the request to enforce the consent decree. (Pet. App. 12a.)

The Sixth Circuit also applied the *Grable* analysis to find jurisdiction based on a substantial federal question. (Pet. App. 12a-15a.) It found the disputed federal issue to be whether the federal Clean Water Act Consent Decree could be modified by stripping a portion of the sewer system from the ownership/control of those obligated to fulfill the Consent Decree's mandates. (Pet. App. 12a-13a.) The court noted that it was impossible to resolve this issue without analyzing and interpreting the Consent Decree. (*Id.*)

Continuing to apply the *Grable* analysis, it found a substantial federal interest because: federal agencies negotiated the decree; the decree impacted thousands of ratepayers and was intended to comply with federal statutes; resolving Loveland's obligations under the decree, if any, would resolve the federal case; and, the decision on the federal issue would have a broad national impact as, depending upon the outcome, other entities could seek to circumvent consent decrees entered into between the United States and cities around the nation to enforce the Clean Water Act. (Pet. App. 13a.)

Completing its *Grable* analysis, the court found that exercising jurisdiction would not upset any federal/state balance of power as federal courts were already charged with enforcing the Clean Water Act and this federal decree arose from a matter already within the court's jurisdiction. (Pet. App. 14a.) The court further noted that the state trial court had already found that the federal court was the proper court to "resolve any issues that have a direct impact on the implementation of" the decree. (*Id.*) And, it noted that the floodgates to additional litigation could be opened if federal jurisdiction was not exercised because litigants could use state courts to attack and undermine a federal court's ability to police its decrees. (*Id.*)

Contrary to Loveland's assertion, neither the facts, nor holdings, of the cited cases from the Ninth, Seventh, and Fifth circuits are relevant. Each cited case dealt with cases that had been removed; this was an originally filed action. The Ninth Circuit found removal improper in the cited case because there was *no federal claim at issue* and federal law did little more than "shape a court's interpretation of state law." *Int'l Union of Operating*

Eng'rs v. County of Plumas, 559 F.3d 1041, 1045 (9th Cir. 2009). The Seventh Circuit found removal improper in the cited case because the claim for relief was *purely state tort law*, and the meaning of a federal statute would play little or no role in the action. *See Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 908-09 (7th Cir. 2007). And, the Fifth Circuit found removal improper as to a *state law malpractice claim* in the cited case where there was no disputed federal issue or law and the case would simply be decided on whether malpractice occurred during a federal trademark suit. *See Singh v. Duane Morris LLP*, 538 F.3d 334, 337-39 (5th Cir. 2008).

None of these circuit cases cited by Loveland are relevant here. The appellate court below recognized that an "adverse impact" alone on a consent decree was insufficient to confer federal jurisdiction. (Pet. App. 10a.) Here, however, there was far more than a mere adverse impact. Indeed, there is no question that a federal issue—modification of a Clean Water Act consent decree—is the heart of the case. It is not an ancillary or side issue. The appellate court resolved the issue of whether a federal consent decree could be modified; it did not resolve a state contract, statute, or legal claim. And, unlike *Bennett* (484 F.3d at 911) *or Singh* (538 F.3d at 340), where recognizing jurisdiction would transfer whole categories of suits to federal court, federal courts already have jurisdiction over enforcement and modification of federal consent decrees. To hold that state courts should determine modifications to Clean Water Act consent decrees over which federal courts maintain jurisdiction would be to turn federal jurisdiction on its head. That is what Loveland invites with its Petition.

Moreover, the district court "retain[ed] jurisdiction to enforce the terms and conditions and achieve the objectives" of the Consent Decree and to resolve disputes regarding its "construction, modification, implementation or execution. . . ." (Pet. App. 5a.) In short, it is not just how the facts of this case should be applied to this particular decree (although the facts do support the decision), it is that the action below involved the interpretation and enforcement—not of a state contract—but of a federal consent decree. This is reserved for federal courts.

B. The Sixth Circuit Did Not Intrude into the State's Domain; The State Dismissed Loveland's State Court Complaint.

Without basis in fact or law, Loveland claims that the district court somehow "seized" this matter from the state court and that the appellate court allowed an "end run" around this Court's removal precedent. (Pet. 14.) Both claims are specious. There was nothing for the district court to "seize" as this was not a removal case. Moreover, the appellate court circumvented no removal precedent as the Board filed its own complaint, asserting a federal claim, and Loveland's state court case was dismissed for failure to state a claim. The state trial court that dismissed Loveland's state court case also declared that the federal court was the proper place for an action, like this one, that would directly affect a consent decree over which a federal court maintained jurisdiction. (Pet. App. 14a.)

Finally, it was Loveland, through its "artful pleading"—and not the Board—that attempted to avoid the proper jurisdiction. (Pet. App. 12a.) Loveland filed a state court complaint ostensibly seeking to terminate the

1985 Agreement between the Board and Loveland. Yet, one third of the fact allegations in Loveland's complaint were dedicated to the Consent Decree. (Dist. Ct. ECF Doc. No. 1, Ex. D.) And, Loveland sought to avoid federal jurisdiction: (1) by not naming the parties to the Consent Decree, including the United States, as defendants even though their consent or the overruling of their objections by the district court was necessary for decree modification; and (2) by not directly stating that it sought to modify the Consent Decree. (*Id.*) But, it clearly did seek to modify the decree as it sought ownership and operational control over property included in, and governed by, the Consent Decree, including large areas and customer populations outside of Loveland's municipal boundaries, and sewers specifically under the jurisdiction of the decree.

The district court, appellate court, and even the state trial court, all found this to be true. The district court made a finding—not challenged below—that "[e]ven Loveland's statement that it has no intent to modify the Consent Decree rings hollow because although it states that it 'will satisfy any and all obligations related to the Polk Run Plant and the Polk Run System,' its current obligations under the Consent Decree . . . are larger." (Pet. App. 31a.) And, recognizing that Loveland sought to modify the decree yet avoid federal jurisdiction, the appellate court held that Loveland "cannot escape the district court's jurisdiction over its consent decree through artful pleading and argument." (Pet. App. 12a.)

The state trial court, too, recognized the federal issue in Loveland's complaint. After dismissing Loveland's complaint for failure to state a claim, the state court declared that had it not dismissed, it would have granted

a stay, in part, because any decision it would make "would directly affect the Consent Decrees, over which the federal court has retained jurisdiction. . . ." (Pet. App. 7a.)

While Loveland now claims that the Sixth Circuit permitted an "end run" around the removal requirements, it never challenged the Board's reasoning below as to why—apart from the fact that the district court had jurisdiction per 28 U.S.C. § 1331 and the substantial federal question doctrine—the Board recognized the central federal issue and filed an original action in the appropriate forum: the federal district court. Removal would have been improper here because the state court did not have jurisdiction over the United States, a party to the Consent Decree and in the case below. As this Court has previously held:

> As the state court was without jurisdiction over either the subject matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there . . . .

Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377, 382 (1922).[4]

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4. *Lambert* was partially superseded by 28 U.S.C. § 1441 in 1986. The amendment eliminates derivative jurisdiction for cases removed from state to federal court for subject matter jurisdiction under § 1441. A subsequent amendment in 2002, as well as the

Accordingly, because the district court could not have obtained jurisdiction over the United States—a necessary party against whom the Board would have had to file a third-party complaint—pursuant to its derivative removal jurisdiction,[5] instituting an original action in the district court was necessary to ensure all parties with an interest in the litigation were subject to the district court's original jurisdiction.[6]

The state court, too, recognized the impropriety of Loveland seeking to take control over property subject to the Consent Decree, *i.e.*, to modify the Consent Decree, without including the United States and other Consent Decree parties that had an interest in the decree. As the state court concluded:

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approach overwhelmingly favored by the courts of appeal, confirm that for cases removed under sections other than 1441, federal courts still have only derivative jurisdiction. Specifically, where a federal concern, such as sovereign immunity, precludes state court jurisdiction, 28 U.S.C. § 1442 applies and removal is still improper. *See, e.g. Palmer v. City Nat'l Bank*, 498 F.3d 236, 239 (4th Cir. 2007), *certiorari denied* 128 S.Ct. 2495 (May 19, 2008)(holding that § 1441(f) limits the abrogation of derivative jurisdiction to removals under §1441).

5. *See Palmer*, 498 F.3d at 239 (affirming dismissal of removed third-party claim against the United States as "the state court did not possess jurisdiction over [the federal] defendants").

6. As indicated above, the United States was dismissed as a defendant in the underlying case after the district court consolidated the Loveland Case with the Consent Decree Case and declared that the United States, and other Consent Decree parties, were able to assert and protect their interests in the Consent Decree via the consolidated action. (Dist. Ct. ECF No. 364, 1-2.) Loveland did not challenge this on appeal.

> The Court would also note that there are other parties in the federal action . . . that have an interest in Loveland's [attempted] termination of the agreement. Those entities are not parties to the current state court action. Therefore, any decision this Court makes could have a direct impact on entities that are not parties to the action. The Court believes that . . . it would be more appropriate for those parties to assert their interests in federal court and allow this court to resolve any state issues that remain upon the conclusion of the federal action. (ECF Doc. No. 386, Ex. A, 19.)(emphasis removed)

Finally, Loveland asserts several false premises as it invites the Court to settle an "unaddressed" point of law: whether a state court defendant can file a federal defense or counterclaim as an original federal action to circumvent the limitations on removal. (Pet. 17.) First, Loveland's state court action was dismissed. (Pet. App. 6a.) And, although on appeal and stayed at Loveland's request, a decision affirming the state trial court would appear to moot this requested appeal. Second, the Board did adhere to the limitations on removal; it filed an original action that included the United States as a party. Third, there was original jurisdiction because: (1) the Board's original action asked the district court to enforce its Consent Decree; and (2) because subject matter jurisdiction arose under the substantial federal question doctrine. (Pet. App. 12a.) Loveland's failure to cite any case with this issue proves that this is not a regularly vexing subject.

C. The Sixth Circuit's Decision Does Not Conflict with the Seventh Circuit Regarding Whether Federal Question Jurisdiction Exists When There Is an Adverse Impact on a Federal Consent Decree.

Loveland is wrong to argue that the Sixth Circuit (1) held that "possible interference" with or an adverse impact on a federal consent decree creates federal jurisdiction and (2) conflicts with the Seventh Circuit's 15-year-old decision in *In re Application of County Collector*, 96 F.3d 890 (7th Cir. 1996). (Pet. 17-20.)

The Sixth Circuit did not so hold. Indeed, it specifically held otherwise:

> We also concluded that having an adverse impact on a consent decree was not enough to establish federal question jurisdiction because, under that logic, 'a slip-and-fall case would be removable to federal court because a damage award would affect [the consent decree party's] finances and consequently its ability to comply with the consent judgment, a result that would abrogate the well-pleaded complaint rule set forth in *Caterpillar* and *Franchise Tax Board*.'" (Pet. App. 10a.)

The appellate court recognized that the case below "involves more than [possible interference with or] simply the economic consequences of the consent decree on non-parties; it involves the attempted removal of property . . . from consent decree obligations." (Pet. App. 11a.) It involves the enforcement and/or modification of a federal consent decree.

Loveland wrongly suggests that the appellate court relied solely on the substantial federal question doctrine to find jurisdiction. That was only one basis for jurisdiction. The appellate court also found jurisdiction on the Board's "request[] that the district court enforce its consent decree" over which it "retain[ed] jurisdiction." (Pet. App. 12a.) And, as this Court stated in *Frew v. Hawkins:*

> [Such a] decree is a federal court order that springs from a federal dispute and furthers the objectives of federal law. . . . [E]nforcing the decree vindicates an agreement . . . reached to comply with federal law. . . . Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.

540 U.S. 431, 438-40 (2004). The Sixth Circuit correctly held that the district court could enforce its decree, including the provisions dealing with decree modification.

Loveland also wrongly argues that the Sixth Circuit assumed that a federal consent decree is a "federal law." (Pet. 18.) The decision nowhere makes such an assumption. If it had, the court would have had no need to find that jurisdiction was also proper "under the substantial federal question doctrine." (Pet. App. 12a.)

This case is also highly distinguishable from *County Collector. County Collector* was both a removal case and a funding case; this case is neither. *County Collector*, 96 F.3d at 892. *County Collector* was about whether state law allowed a school district to levy certain taxes. *See id.* at 896. This case has nothing to do with those issues; it involves modification of a federal consent decree.

And, there was no question in *County Collector* that the state court plaintiffs "did not attempt to avoid federal court through artful pleading" because they "could not have presented their claims in a federal forum." *Id.* at 897. Here, Loveland sought to modify the Consent Decree and the appellate court found that Loveland could not "escape the district court's jurisdiction over its consent decree through artful pleading. . . ." (Pet. App. 12a.) Loveland could have filed its own federal action or sought to intervene in the Consent Decree case. Its "artful" attempts to avoid doing so distinguish it from *County Collector.*

Finally, *County Collector* does not conflict with the decision below. Both decisions note that an adverse impact on a federal consent decree is alone insufficient to confer federal jurisdiction. *County Collector*, 96 F.3d at 897; (Pet. App. 10a-11a.) Moreover, there is no federalism constraint at issue. Loveland's state complaint was dismissed and no federal court interpreted or ruled on a state contract or statute. And, the state court that addressed Loveland's claim to remove property from/modify the Consent Decree stated that the federal court with continuing jurisdiction over the decree should hear that claim. (Pet. App. 14a.)

II. LOVELAND SEEKS CERTIORARI ON AN ISSUE NEVER ADDRESSED BY THIS COURT AND NOT ADDRESSED BY THE COURT BELOW.

With its final argument, Loveland asks this Court to serve as a court of error. (Pet. 20-23.) Loveland disguises this fact by asserting that the case raises the issue of whether a non-party can be bound by a federal judgment solely because its conduct induced reliance on

that judgment. (Pet. 21.) Loveland's merits argument is wrong and the Sixth Circuit never held that Loveland was bound to a federal judgment, whether through its conduct or otherwise.

Loveland's merits argument suggests that the Sixth Circuit precluded Loveland's state law claim from being addressed by a state court. (Pet. 21.) This is inaccurate, as a state trial court addressed—and then dismissed for failure to state a claim—Loveland's state court claim.

Loveland also wrongly implies that the Sixth Circuit lacked facts upon which to reach its decision. Loveland had notice of the Consent Decree as a matter of law and it admitted it voiced no objection during the years Consent Decree work was performed in its jurisdiction. (Pet. App. 16a-17a.) Moreover, the district court found "no genuine dispute" that the Consent Decree parties "relied upon the assumption that Loveland ratepayers were part of MSD's global system" in "craft[ing] the complex, multi-year infrastructure improvements that have begun the implementation of the remedies required by the Consent Decree[]." (Pet. App. 31a and 8a.) The Sixth Circuit agreed and based its decision on the undisputed facts: Loveland had knowledge of the decree and the Board, and other Consent Decree parties, relied on its silence. (Pet. App. 17a.)

Finally, Loveland's argument that this Court's decision in *Taylor v. Sturgell*, 553 U.S. 880 (2008), and the application of *Taylor* by the Court of Claims in *Bartels Trust v. United States*, 88 Fed. Cl. 105 (2009), is a basis for certiorari is incorrect. Both *Taylor* and *Bartels Trust* were "virtual representation" and preclusion cases; this case is neither.

In *Taylor*, this Court noted that "The Restatement observes that a nonparty may be bound not only by express or implied agreement, but also through conduct inducing reliance on others. . . . We have never had occasion to consider this ground for nonparty preclusion, and we express no view on it here." *Taylor*, 553 U.S. at 894 n.7 (citing CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4453 (2d ed. 2002)). The Court did not "reserve" the issue in *Taylor*; it simply noted that it was not at issue. It was likewise not at issue in *Bartels Trust*, where the Court of Claims cited to *Taylor* to explain that conduct inducing reliance was not at issue. *See Bartels Trust*, 88 Fed. Cl. at 113-114.

The Sixth Circuit specifically found "Loveland's contention that it is not bound by the consent decree [to be] accurate. . . ." (Pet. App. 17a.) Thus, the Sixth Circuit did not hold that Loveland was bound by a federal judgment, whether through its reliance inducing conduct or otherwise. It likewise did not preclude Loveland from raising a claim because of a prior judgment. Loveland litigated whether it could modify the Consent Decree. Neither the district court nor appellate court were persuaded by Loveland's modification arguments. The Sixth Circuit upheld the district court's order enjoining Loveland from modifying the Consent Decree on grounds of laches and equitable estoppel. This, of course, disproves Loveland's contention that the Sixth Circuit found Loveland bound by the decree "solely because its conduct allegedly induced reliance." (Pet. 20.)

Loveland's underlying premise, that this is a non-party preclusion case, is simply wrong. The Sixth Circuit held that Loveland was *not* bound by the Consent Decree, whether through its conduct inducing reliance or

otherwise. Thus, the "unresolved" issue not yet addressed by this Court in *Taylor* was also not addressed by the Sixth Circuit. There is no ground for review here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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